

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35862

MICHAEL A. ANTONICCHIO, an)	2009 Unpublished Opinion No. 693
individual,)	
)	Filed: November 24, 2009
Plaintiff-Appellant,)	
)	Stephen W. Kenyon, Clerk
v.)	
)	THIS IS AN UNPUBLISHED
KOOTENAI COUNTY, an Idaho municipal)	OPINION AND SHALL NOT
corporation; KOOTENAI COUNTY)	BE CITED AS AUTHORITY
SHERIFF’S DEPARTMENT, an Idaho)	
governmental entity; and DEPUTY)	
STINEBAUGH, an employee or agent of)	
Kootenai County,)	
)	
Defendants-Respondents.)	
)	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Charles W. Hosack, District Judge.

Order of the district court dismissing complaint, affirmed.

Palmer George, PLLC, Coeur d’Alene, for appellant. Michael G. Palmer argued.

Paine Hamblen LLP, Coeur d’Alene, for respondents. Seann M. Mumford argued.

GRATTON, Judge

Michael A. Antonicchio appeals from the district court’s dismissal of his complaint for failure to post the bond required by Idaho Code § 6-610. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

This matter arises from an altercation incident to arrest on June 7, 2006. On May 6, 2008, Antonicchio filed a complaint against the arresting officer, Kootenai County Deputy Stinebaugh, Kootenai County, and the Kootenai County Sheriff’s Department for unlawful and tortious conduct under I.C. § 6-901, the Idaho Torts Claim Act (“ITCA”). On June 6, 2008, respondents filed an answer asserting, among other things, that Antonicchio had failed to file the

bond required by I.C. § 6-610. The district court dismissed the complaint against Kootenai County and the Kootenai County Sheriff's Department for failure to state a claim upon which relief may be granted and against Deputy Stinebaugh for failure to file a bond as required by I.C. § 6-610. Antonicchio's request for leave for late filing of the bond was denied. Antonicchio appeals the dismissal of the complaint against Deputy Stinebaugh and denial of an extension of time for the filing of a bond. Respondents request attorney fees pursuant to I.C. § 6-918A.

II.

ANALYSIS

Idaho Code § 6-610 provides in relevant part:

(2) Before any civil action may be filed against any law enforcement officer or service of civil process on any law enforcement officer, when such action arises out of, or in the course of the performance of his duty, or in any action upon the bond of any such law enforcement officer, the proposed plaintiff or petitioner, as a condition precedent thereto, shall prepare and file with, and at the time of filing the complaint or petition in any such action, a written undertaking with at least two (2) sufficient sureties in an amount to be fixed by the court. The purpose of this requirement is to ensure diligent prosecution of a civil action brought against a law enforcement officer, and in the event judgment is entered against the plaintiff or petitioner, for the payment to the defendant or respondent of all costs and expenses that may be awarded against plaintiff or petitioner, including an award of reasonable attorney's fees as determined by the court.

....

(4) At any time during the course of a civil action against a law enforcement officer, the defendant or respondent may except to either the plaintiff's or petitioner's failure to file a bond or to the sufficiency of the sureties or to the amount of the bond.

(5) When the defendant or respondent excepts to the plaintiff's or petitioner's failure to post a bond under this section, the judge shall dismiss the case.

Antonicchio contends that I.C. § 6-610, if applied to bar suit, contravenes the public policy of providing a litigant his day in court and, thus should not be applied to require dismissal under such circumstances.¹ Antonicchio states that "Appellant does not argue the language or

¹ In the district court Antonicchio also claimed that I.C. § 6-610 was unconstitutional. However, he did so without recognition of the holding in *Pigg v. Brockman*, 79 Idaho 233, 242, 314 P.2d 609, 614 (1957), that the statute was constitutional as a valid exercise of police power, having a reasonable and substantial relation to some public good, and a reasonable and

intent of the statute as written. Appellant argues that the statute, when applied, contradicts judicial policy, modern law and the law of our sister states, and thereby denies Appellant his day in court.” However, this Court is not at liberty to disregard the plain language of the statute which, as Antonicchio acknowledges, clearly mandates dismissal.

This Court’s authority is limited to applying the Constitution and laws to the facts of the case before us. *Electrical Wholesale Supply Co. v. Nielson*, 136 Idaho 814, 825, 41 P.3d 242, 253 (2001). In *Electrical Wholesale Supply Co.*, the Court refused to consider an argument that the statute was against public policy, where there was no argument of statutory interpretation or constitutionality. *Id.* “The Court may not invade the powers of the legislature by striking down a statute unless it is unconstitutional. The power to make law and declare public policy is vested with the legislature. This Court will not intrude upon the province of the legislature.” *Id.* (internal citations omitted). We are not unsympathetic to the very real danger that a litigant, unaware of the requirement of I.C. § 6-610, may find his or her potentially meritorious action dismissed on procedural grounds. We also understand Antonicchio’s argument that allowing a timely cure of the failure to file the bond would provide the protection contemplated by the statute consistent with the policies behind the statute. However, again, we are without authority to disregard the plain language of the statute or effectively insert additional provisions into the statute. Antonicchio’s contentions on this appeal are best directed to the legislature.

Antonicchio cites to *Hyde v. Fisher*, 143 Idaho 782, 152 P.3d 653 (Ct. App. 2007), *Neal v. Harris*, 100 Idaho 348, 597 P.2d 234 (1979), and *Hurley v. Marshal*, No. CV-01-5149 (D. Idaho Nov. 22, 2002), arguing that these cases represent an effort by the courts to erode the harsh effects of I.C. § 6-610. However, the *Hyde* court merely reconciled the bond requirements of I.C. § 6-610 with the mandates of I.C. §§ 31-3220, 3220A under which indigents may be relieved of the bond requirement. *Hyde*, 143 Idaho at 786, 152 P.3d at 657. Antonicchio’s reliance on *Hyde* is particularly misplaced as the same argument was rejected by this Court just last year in *Beehler v. Fremont County*, 145 Idaho 656, 660, 182 P.3d 713, 717 (Ct. App. 2008). In *Neal*, a cost bond was required by I.R.C.P. 83(h) before filing an appeal; however, the rule,

constitutional means of achieving its goal. On this appeal, Antonicchio does not directly claim that the statute is unconstitutional or request that *Pigg* be overruled.

which had been repealed by the time of the case, did not clearly apply to appeals from administrative agencies. *Neal*, 100 Idaho at 350, 597 P.2d at 236. The *Hurley* court simply held that a 28 U.S.C. 1983 claim preempted the bond requirement. *Hurley*, No. CV-01-5149.

Antonicchio relies on *Hunter Contracting Co. v. Superior Court in and for the County of Maricopa*, 947 P.2d 892 (Ariz. App. Div. 1, 1997), for the proposition that courts may look to alternatives to dismissal. He asserts: “The courts must come to realize that the considerations upon which the traditional rule was built are archaic and lead to inequities as applied.” Antonicchio points to Idaho Rules of Civil Procedure 12 and 56 as examples of tools available to weed out non-meritorious cases instead of dismissal for failure to post bond. This argument disregards a primary reason for the bond requirement of I.C. § 6-610, which is to ensure payment of the fees and costs necessary to secure summary dismissal under the cited rules. Antonicchio also points to cases from other states, in a variety of situations, where courts have considered alternatives to dismissal. Most of the cited cases relate to discretionary sanctions which may be employed for violation of rules. Others have held that, for reasons not directly applicable here, bond requirements violated specific state constitutional provisions.

Moreover, the application of I.C. § 6-610 has previously been addressed by the Supreme Court and this Court. Recently, in *Athay v. Stacey*, 146 Idaho 407, 411-412, 196 P.3d 325, 329-330 (2008), the Idaho Supreme Court stated:

Idaho Code § 6-610 requires that a plaintiff filing a civil lawsuit against a law enforcement officer for a claim arising out of, or in the course of performance of the officer’s duty must file a bond *at the same time that the plaintiff files the complaint*. The purpose of the bond is to ensure diligent prosecution of the lawsuit and the payment of all costs and expenses, including a reasonable attorney’s fee, that may be awarded against the plaintiff. If the plaintiff does not file the bond, and the defendant law enforcement officer objects, then *the court must dismiss the lawsuit*.

(Footnote omitted, emphasis added.) In *Pigg v. Brockman*, 79 Idaho 233, 242, 314 P.2d 609, 614 (1957), the Court held that the provisions of I.C. § 6-610 are “mandatory.” In *Greenwade v. Idaho State Tax Comm’n*, 119 Idaho 501, 503, 808 P.2d 420, 422 (1991), the Court noted that when the statute is not complied with “the district court must dismiss the action when the appropriate objection is timely urged by the defendant.” In *Beehler*, 145 Idaho at 659, 182 P.3d at 716, we also held that “dismissal in this circumstance is mandatory.”

Antonicchio argues that the district court should have allowed him to “cure” the violation of I.C. § 6-610 by a belated filing of bond. This argument has also been decided by our Supreme Court. In *Monson v. Boyd*, 81 Idaho 575, 582, 348 P.2d 93, 97 (1959), the Court held:

Lastly, plaintiff contends that court should not have summarily dismissed the action upon defendants’ motion, but should have allowed plaintiff time to file a bond, upon determining the statute was applicable. This point was settled adversely to plaintiff in *Pigg v. Brockman*, supra. Where the complaint shows on its face, or where it is made to appear by evidence in support of a motion to dismiss, that the action is against peace officers and arises out of or in the course of the performance of the duty of such officers, if I.C. § 6-610 has not been complied with, the action must be dismissed.

This Court is neither inclined nor empowered to overrule *Monson*.² The district court correctly dismissed the action.

Respondents request attorney fees on appeal under I.C. § 6-918A. The statute allows attorney fees when there is a “showing, by clear and convincing evidence, that the party against whom or which such award is sought was guilty of bad faith in the commencement, conduct, maintenance or defense of the action.” I.C. § 6-918A. Bad faith is dishonesty in belief or purpose. *Cobbley v. City of Challis*, 143 Idaho 130, 135, 139 P.3d 732, 737 (2006). While we do not believe that Antonicchio was on firm foundation in bringing this appeal, the respondent’s have not shown bad faith by clear and convincing evidence. No attorney fees are awarded on appeal.

III.

CONCLUSION

Idaho Code § 6-610 requires posting of a bond contemporaneously with the filing of the complaint. This requirement is mandatory. Antonicchio did not file a bond with the complaint. Upon objection by respondent, the district court was required to dismiss the complaint. The district court’s order dismissing Antonicchio’s complaint for failure to file a written undertaking

² We note that the legislature provided alternatives to automatic dismissal in regard to the objections noted in I.C. § 6-610(4) relative to the sufficiency of the sureties and the amount of the bond. In I.C. § 6-610(6), before the matter must be dismissed, the plaintiff is given an opportunity to justify the sureties. I.C. § 6-610(7) provides that, upon objection, a hearing may be held on the amount of the bond and, upon resetting, plaintiff is given time to file a bond in the set amount. The legislature chose to provide no such alternative or opportunity to cure in regard to the failure to file a bond in I.C. § 6-610(5), although perhaps it could do so and, thereby, alleviate the potentially harsh effects of dismissal. But, until such time, dismissal is mandated.

as required by I.C. § 6-610 is affirmed. Respondents are awarded costs pursuant to I.A.R. 40 but are not awarded attorney fees.

Chief Judge LANSING and Judge MELANSON, **CONCUR.**